U.S. Department of Justice

United States Attorney
Eastern District of New York

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December 4, 2006

BY HAND

Officer Mark Gjelaj
United States Probation Department
Eastern District of New York
75 Clinton Street
Brooklyn, NY 11201

Re: **United States v. Shahawar Matin Siraj**
Criminal Docket No. 05-104 (S-1)(NG)

Dear Officer Gjelaj:

The government respectfully submits this letter in response to the defendant's letter expressing objections to the Presentence Report ("PSR"). While the government disputes the substance of most of the defendant's allegations, we write to correct merely those allegations that we believe are factually incorrect or misleading and material to sentencing.

In paragraph 4 of his letter, the defendant argues that "the scouting out and drawings of the 34th Street subway station noted in ¶ 19 were conducted at the request of and under the direction of the CI." At trial, evidence, including the audiotapes and videotape, the testimony of the confidential informant ("CI") and Detective Nugent, and the admissions of the defendant on cross-examination, demonstrated that the defendant -- on his own and without any request or direction from the CI - identified the 34th Street subway station at Herald Square as a target for terrorist attack. Trial Trans. at 749, 1840-43, 1993, 2762-64, 2977-78; GE 19a at 29 (defendant boasting of hatching plan). The evidence demonstrated that the defendant visited the 34th Street subway station and conducted reconnaissances on numerous occasions -- on his own and without any request or direction from the CI. Trial Trans. at 2991, 2996-97, 3000-01, 3006-08. In addition, the defendant -- on his own, without any request or direction from the CI -- drew a map of the 34th Street subway station. See id. at 752-54, 2978, 3008, 3014; Govt. Exh. 8 (map drawn by defendant). Subsequently, the defendant offered to show the CI the subway station in person so that the CI could understand the plan better; the CI agreed. Trial Trans. at 2978. On August 21, 2004, the defendant, the CI and James Elshafay visited the subway station together, conducted a joint reconnaissance, and, on that occasion, the CI suggested that additional maps of the station be drawn. Elshafay and the defendant drew the maps and provided them to the CI for distribution to the alleged terrorist organization, which the defendant and Elshafay believed would provide the explosive device for the terrorist attack.

In paragraph 5 of the defendant's letter, he alleges that he did not lie under oath. However, in a prior submission, the government provided the Probation Department with a representative sample of approximately 25 outright lies and false statements that the defendant provided during his sworn testimony at the suppression hearing and the trial. In addition, at the trial, the defendant advanced a series of false statements about his lack of interest in, and lack of prior statements regarding, violent and terrorist activity. Then, when it became clear during cross-examination that the government intended to call an undercover officer ("UC") to rebut the defendant's false testimony,[1] the defendant reversed himself and changed his testimony markedly in an attempt to conform it to the anticipated rebuttal evidence. A comparison of the defendant's testimony before and after he knew of the upcoming rebuttal testimony from the UC demonstrates unequivocally that the defendant attempted to obstruct justice through false testimony.

In paragraph 7 of his letter, the defendant argues that his contention that he was entrapped was not contradicted by tape recordings and the testimony of the CI and the UC. This argument is factually inaccurate. First, the CI's testimony directly and irreconcilably contradicted that of the defendant. The jury verdict reinforces what was abundantly clear during the trial -- that the CI was a credible witness who provided credible testimony, while the defendant lied repeatedly under oath. Second, as set forth above, the UC's testimony directly contradicted the defendant's testimony, not only on the issue of predisposition, but also on the critical issue of inducement. At the heart of the defendant's case was his claim that he was a non-violent individual with no interest in, nor affinity for, terrorist activity prior to meeting the CI, and that the CI induced the charged crime by changing the defendant's character. The UC's testimony demonstrated unequivocally the falsehood of that critical contention. Finally, the recordings demonstrated the defendant's false testimony through the utter absence of a shred of corroboration for his allegations; indeed, in scores of hours of unedited conversation, neither the defendant nor the CI made a single statement or allusion to the alleged inducement which, according to the defendant, had just taken place.

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[1] After the conclusion of the defendant's direct testimony and after the beginning of cross-examination, the government revealed its intention to call the UC and turned over § 3500 materials. Trial Trans. at 3052. The next day, the defendant changed his testimony regarding his prior conduct, making his prior false statements under oath abundantly clear.

In paragraph 8 of his letter, the defendant alleges that he somehow should still qualify for an adjustment for acceptance of responsibility, despite putting the government to its burden of proof and despite his false testimony at the hearing and trial. There is some dispute among the Circuits as to whether a defendant who asserts an entrapment defense can ever qualify for an acceptance of responsibility adjustment.[2] Compare, e.g., United States v. Kendrick, 423 F.3d 803, 810 (8th Cir. 2005) ("[a] defendant asserting an entrapment defense is not entitled to a reduction under § 3E1.1") with United States v. Kirkland, 104 F.3d 1403, 1405 (D.C. Cir. 1997) (acknowledging that entrapment claim "appears particularly inconsistent with a demonstrated acceptance of responsibility," but refusing to rule out slim possibility that defendant who asserts entrapment defense at trial might qualify for reduction under some set of facts). However, even in those circuits where asserting an entrapment defense is not an absolute bar to a reduction for acceptance of responsibility, courts have rejected such motions where the defendant lied under oath or demonstrated in some other way a failure to accept responsibility. See, e.g., United States v. Roper, 135 F.3d 430, 435 (6th Cir. 1998) (rejecting reduction for acceptance of responsibility where defendant concocted story to excuse illegal conduct); United States v. Silva, 122 F.3d 412, 416 (7th Cir. 1997). In addition, courts have rejected such motions where the factual case demonstrating the defendant's guilt was strong, leaving entrapment as the only possible defense. See United States v. Capelton, 350 F.3d 231, 245 (1st Cir. 2003). In the instant case, the government's evidence of factual guilt was exceedingly strong, and the defendant lied repeatedly under oath. See supra. Significantly, the defendant's essential argument in his defense at trial was that the crime was not his fault because he was brainwashed by the CI. When confronted with his prior statements to the UC expressing support for and interest in terrorist activities, the defendant and defense counsel suggested that expressions of support for and interest in terrorist activities were standard in the Muslim community. Not only are such contentions patently false, but they are the antithesis of true acceptance of responsibility.

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[2] The Second Circuit has apparently declined to resolve the issue. See United States v. Rosa, 17 F.3d 1531, 1552 (2d Cir. 1994).

Moreover, in his interview with the Probation Department, the defendant continued to maintain adamantly that he is "not the type of person who would have hatched such a plan, referring to the instant offense." PSR, ¶ 44. Anyone who listened to the defendant's voluminous, unprompted, and chilling descriptions of his detailed and well-constructed plans for bombing the 34th Street subway station, the 42nd Street subway station, the 59th Street subway station, the Verrazano bridge, the Manhattan bridge, the Kocsiuszko bridge and an assortment of other targets in New York City, knows that this statement is patently false and demonstrates a continued failure to accept responsibility.

In paragraph 9 of his letter, the defendant alleges that he is unaware of any false statement on an immigration document in 2004. In 2004, the defendant initially informed Agent Spiros Karabinas of Immigration and Customs Enforcement that he was unafraid to return to Pakistan. Subsequently, the defendant falsely claimed in a submission to the immigration court that he was deeply afraid to return to Pakistan for fear of harm to his person. During the recorded conversations introduced at trial, the defendant confessed that he had no fear of returning to Pakistan and that his family occupied positions of authority there. Govt. Exh. 25A at 7; 27B at 16. Moreover, the defendant told the UC that he had come up with the asylum claim, but that he would come up with something else if the asylum application did not work. Trial Trans. at 3318. In particular, he described to both the UC and the CI his plan to engage in a sham marriage in the United States in order to gain legal status fraudulently, were the asylum claim not to work. Id. at 3118, 3268; Govt. Exh. 24B at 28. As set forth in the government's letter of November 9, 2006, the defendant also lied under oath regarding these issues and others at an immigration proceeding on August 17, 2004. Finally, at the suppression hearing in the instant case, the defendant admitted that he changed his story regarding his fear of returning to Pakistan in order to gain a benefit. Hearing Trans. at 275.

With respect to the defendant's health-related complaints in paragraphs 11-12, the government has taken steps to assure that the Metropolitan Detention Center is providing the defendant with appropriate medical care.

Please do not hesitate to contact us if you have any questions or concerns about the information contained in this letter or the government's prior letter regarding the PSR, dated November 9, 2006.

Respectfully submitted,

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cc: The Honorable Nina Gershon, U.S. District Judge
Martin Stolar, Esq. (by facsimile)